

Claimant contends the Board has no jurisdiction to review this appeal as it meets neither the requirements of K.S.A. 2013 Supp. 44-534a nor K.S.A. 2013 Supp. 44-551. Further, claimant argues respondent's due process argument should be dismissed as it had more than adequate time to object or disagree to claimant's request.

The issues for the Board's review are:

1. Does the Board have jurisdiction to review respondent's appeal?
2. If so, did the ALJ exceed his authority in granting claimant's motion to extend time without the due process of a hearing?

#### **PROCEDURAL HISTORY**

Claimant filed an Application for Hearing with the Division on November 12, 2013, alleging an accident date on or about October 26, 2011, while performing her duties at respondent. A Notice of Hearing dated November 19, 2013, was sent to the parties by the Division. Shortly thereafter, on November 21, 2013, respondent's counsel entered her appearance.

Claimant then filed a Motion to Grant Extension of Time Pursuant to K.S.A. 44-523(f) with the Division on December 13, 2013. The Motion states, in part:

As of the date of this motion there is no necessity for a hearing on this matter. That the matter will be set for hearing at such time as the parties are unable to agree on said extension or tolling of the statute of limitations until further Order of the Court.<sup>1</sup>

In a letter dated July 30, 2014, which did not contain a notation indicating a copy was sent to respondent's counsel, claimant submitted the following to the ALJ:

Enclosed please find an original of an Order concerning the above referenced matter. Please file with the Court and send both parties a file stamped copy of the same.<sup>2</sup>

The Order enclosed states, in part:

NOW ON THIS 30<sup>th</sup> day of July, 2014, this matter comes before the Court on the Claimant's Motion to Grant Extension of Time Pursuant to K.S.A. 44-523(f). The parties appear through counsel and announce their agreement for the extension of time to proceed to a final hearing, settlement hearing or an agreed award.<sup>3</sup>

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<sup>1</sup> Cl. Motion (filed Dec. 13, 2013) at 1.

<sup>2</sup> Cl. Letter (Jul. 30, 2014) at 1.

<sup>3</sup> ALJ Order (Aug. 11, 2014) at 1.

The ALJ signed the Order granting claimant's Motion on August 11, 2014 without a hearing. There is no record in the administrative file suggesting respondent agreed to, approved or had knowledge of the alleged agreed order prior to August 11, 2014. The Order, approved by the ALJ, did not have a signature line upon which respondent could note agreement. Respondent filed an Application for Review of the ALJ's Order with the Board on August 18, 2014, denying it agreed to the Order.

#### PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-523(f) states:

(f)(1) In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

(2) In any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

(3) This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

K.S.A. 2013 Supp. 44-551(l)(1) provides, in part:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party . . . . On

any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award for compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2013 Supp. 44-555c(a) provides, in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

### ANALYSIS

The ALJ in his Order wrote that the parties announced their agreement to an extension of time under K.S.A. 44-523(f). Respondent alleges that such an agreement was never made. There is no record of the proceeding. No agreed order was filed memorializing the agreement. As there is an apparent misunderstanding as to the intent of the parties, the Board will review this as if there were no agreement by respondent to the extension of time.

Respondent argues it is entitled to hearing on the issue of an extension of time under K.S.A. 44-523(f), at which claimant must show good cause for the extension. The Board agrees. The Kansas Constitution requires all parties receive procedural due process of law.<sup>4</sup> The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case.<sup>5</sup> To satisfy due process, notice must be reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of an action and to afford the parties an opportunity to present any objections.<sup>6</sup> A lack of notice of a hearing is a denial of due process.<sup>7</sup>

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<sup>4</sup> See K.S.A. Const. Bill of Rights, § 18.

<sup>5</sup> See *Collins v. Kansas Milling Co.*, 207 Kan. 617, 485 P.2d 1343 (1971).

<sup>6</sup> See *Johnson v. Brooks Plumbing, LLC.*, 281 Kan. 1212, 135 P.3d 1203 (2006).

<sup>7</sup> See *Crease v. Vezers Precision Industrial Constructors International, Inc.*, No. 1,035,775, 2007 WL 4662039 (Kan. WCAB Dec. 7, 2007).

In *Adams v. Marshall*,<sup>8</sup> the Kansas Supreme Court stated:

In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:

'An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or . . . full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . . .'

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.<sup>9</sup>

Additionally, the Workers Compensation Act itself requires the parties to a claim be afforded a reasonable opportunity to be heard and present evidence. While K.S.A. 44-523(f) does not specifically require a hearing or notice of a hearing, K.S.A. 44-523(a) provides in part:

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

K.S.A. 44-523(f) requires the affirmative showing of good cause by a claimant to obtain an extension of time under the statute. Absent an agreement, on the record or in writing, a hearing is required.

Claimant argues the Board does not have jurisdiction to review respondent's appeal. As a general rule, an ALJ's denial of a motion to dismiss pursuant to K.S.A. 44-523(f) is considered an interlocutory order, over which the Board does not have jurisdiction.<sup>10</sup>

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<sup>8</sup> *Adams v. Marshall, et al.*, 212 Kan. 595, 601-02, 512 P.2d 365 (1973).

<sup>9</sup> See *Davenport Pastures v. Morris County Board of County Comm'rs*, 291 Kan. 132, 139, 238 P.3d 731 (2010); *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999).

<sup>10</sup> See *Walker v. State of Kansas*, No. 1,048,030, 2013 WL 485696 (Kan. WCAB Jan. 25, 2013); *Stupasky v. Hallmark Marketing Corp.*, No. 1,031,988, 2012 WL 1142954 (Kan. WCAB Mar. 14, 2012); *Pham v. Dold Foods, Inc.*, Nos. 1,013,951 & 1,013,952, 2011 WL 6122903 (Kan. WCAB Nov. 22, 2011).

Claimant cites *Walker*, *Stupasky* and *Pham* in support of her position. In *Walker* and *Stupasky*, a hearing was conducted, satisfying the due process rights of the parties. In *Pham*, it is not evident from the Order if the ALJ conducted a hearing or simply ruled on the Motion.

In this case, the constitutional defect, respondent's right to due process, takes precedence over the substance of the ALJ's Order. A required hearing was not conducted. The Board takes jurisdiction over the matter pursuant to the general jurisdiction provisions of K.S.A. 2013 Supp. 44-555c(a).

### **CONCLUSION**

Respondent is entitled to a hearing to determine if good cause exists for the claimant to receive an extension of time under K.S.A. 44-523(f).

### **ORDER**

**WHEREFORE**, it is the finding, decision and order of the Board that the ALJ's August 11, 2014, Order is vacated and the matter remanded for a hearing to determine if claimant is entitled to an extension of time under K.S.A. 44-523(f).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Brad E. Avery, Administrative Law Judge